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No. 78-494

In the Supreme Court of the United States

OCTOBER TERM, 1978

TEXTRON, INC., BELL HELICOPTER TEXTRON, A DIVISION OF TEXTRON, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the dismissal of its third-party complaint against the United States on the authority of *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), is inconsistent with this Court's decision in *Maryland ex rel. Levin* v. *United States,* 381 U.S. 41, judgment vacated on other grounds, 382 U.S. 159 (1965).

Petitioner designed and manufactured a helicopter that crashed in 1976, killing two Virginia Army National Guard officers who were on a flight training mission necessary to maintain their pilot status under U.S. Army regulations. The estates of the decedent officers sued petitioner, claiming that the helicopter had been negligently designed and manufactured. Petitioner then brought third-party claims against the United States, the Commonwealth of Virginia, and the Virginia National

Guard seeking indemnity or contribution on the theory that the third-party defendants had improperly maintained and overhauled the helicopter. The district court dismissed the third-party claims (Pet. App. 22a-23a, 42a-43a), and the court of appeals affirmed (Pet. App. 4a-6a), holding that the third-party claim against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), is foreclosed by *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), and the third-party claims against the Commonwealth are barred by sovereign immunity.

Stencel Aero applied to third-party claims the rule of *Feres* v. *United States*, 340 U.S. 135 (1950)—that the Federal Tort Claims Act does not cover injuries to servicemen suffered "in the course of activity incident to service." The *Feres* doctrine is based upon the conclusion that the Federal Tort Claims Act should not be applied to servicemen's injuries because of the "distinctively federal" relationship between the government and servicemen, which made reference to state law to determine the government's liability to servicemen unsuitable, and because of the existence of military compensation schemes for injured servicemen. Additionally, the doctrine serves to protect military discipline from the fractiousness caused by tort suits. *Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 671-72.

Petitioner contends, however, that *Stencel Aero* is inapplicable to the third-party claims in the instant case because under *Maryland ex rel. Levin* v. *United States, supra*, the national guardsmen killed in the helicopter crash were not federal servicemen, but rather employees of the Commonwealth of Virginia. Contrary to petitioner's arguments, the government's reliance on the doctrine of *Feres* and *Stencel Aero* is in no way inconsistent with the principles of *Maryland ex rel. Levin* v. *United States, supra*. The latter case holds only that

because national guardsmen are appointed by state officials and serve under the immediate control of the state, their torts cannot render the United States liable under the Federal Tort Claims Act, which imposes on the federal government respondeat superior liability for the negligence of federal employees acting within the scope of their employment. See *Laird* v. *Nelms*, 406 U.S. 797 (1972).

There is no anomaly in holding that a national guardsman is "engaged in activity incident to [federal] service" so as to call into play the *Stencel Aero* doctrine, even though there is no basis for respondeat superior liability on the part of the United States if the serviceman's action is tortious.[1] Indeed, *Stencel Aero* itself involved a national guardsman who was injured, like the decedents here, on a training mission. Although Army national guardsmen are appointed by state officials and serve under state command, they are also members of the United States Army, 10 U.S.C. 101(9)-(11), 269(b), 3062(c)(1), 3076-3080, and they may be called into federal service in times of emergency. 10 U.S.C. 3500. National guard units are subject to the control of the President and of the Secretary of the Army. See 32 U.S.C. 104(b), 104(e), 104(f)(1), 110, 502. Furthermore, where, as here, national guardsmen are performing training duties in order to maintain their proficiency under Army standards, they are paid by federal appropriations. 32 U.S.C. 106. And when a guardsman is killed or injured while performing training duties, the federal government pays

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[1]By the same token, there is no merit to petitioner's argument (Pet. 16-21) that the Commonwealth's position was inherently contradictory. And, since the court of appeals correctly concluded that the third-party claims in the instant case were properly dismissed, this case presents no occasion for consideration of petitioner's contention (Pet. 21-30) that a federal rule of contribution and indemnity should be adopted because of the federal interest in the regulation of aircraft.

medical expenses and compensatory benefits. 32 U.S.C. 318-321. Accordingly, every court that has considered the question has concluded that national guardsmen, like full-time federal servicemen, are barred by the *Feres* doctrine from bringing tort actions against the government for injuries incident to their service. *Herreman* v. *United States,* 476 F. 2d 234 (7th Cir. 1973); *Peluso* v. *United States,* 474 F. 2d 605 (3d Cir.), cert. denied, 414 U.S. 879 (1973); *Layne* v. *United States,* 295 F. 2d 433 (7th Cir. 1961), cert. dismissed, 368 U.S. 990 (1962); *Coletta* v. *United States,* 300 F. Supp. 19 (D. R.I. 1969).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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